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No. 91-975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

LEO J. SONNENBURG, GERALD HARNETT and DENNIS SHEFFIELD,
Petitioners,

v.

EVAN BAYH, Governor of the State of Indiana and JERRY THADEN, Commissioner of the Indiana Department of Mental Health,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

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QUESTIONS PRESENTED

I. Whether the "civic duty" or other common law exceptions to the Thirteenth Amendment apply to state mental patients engaged in now-discontinued therapeutic work programs from 1970 to 1974?

II. Whether this Court should create, in the absence of enabling legislation, a direct cause of action for damages under the Thirteenth Amendment?

III. Whether the patients' claim under the Federal Fair Labor Standards Act (FLSA) based on work performed from 1970 to 1974 was correctly rejected by the Indiana Supreme Court on the basis of this Court's retrospective decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and other procedural defects?

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EVAN BAYH, Governor of the State of Indiana and JERRY THADEN, Commissioner of the Indiana Department of Mental Health,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

Respondents, Evan Bayh, Governor of the State of Indiana, and Jerry Thaden, Acting Commissioner of the Indiana Department of Mental Health, respectfully pray this Court deny issuance of a writ of certiorari to review the decision of the Indiana Supreme Court entered June 12, 1991 in *Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991).

STATUTORY PROVISIONS INVOLVED

The Thirteenth Amendment to the Constitution is correctly set out in the Petition (Pet. p. 1). In addition to the portions of the Fair Labor Standards Act (FLSA) contained in Appendix F to the Petition, other portions are also applicable and are set out in Appendix A to this Brief in Opposition. Included in Appendix B to this Brief in Opposition is the portion of Ind. Code § 16-14-18.1-3 which charges mental patients and their estates for the cost of care and treatment.

STATEMENT OF THE CASE

The theory inherent in the Plaintiffs' case is that Dr. Otis Bowen, Governor of Indiana during much of the period covered by this lawsuit and, by implication, all of his predecessors, enslaved Indiana's state mental patients by permitting them to be given industrial therapy assignments. This bizarre theory is unsupported by either the law or the facts.

This action was brought by a class of present and former Indiana mental patients seeking payment of the federal minimum hourly wage for work done in industrial therapy assignments given them at Indiana state mental hospitals between May 23, 1970 and December 31, 1974. The original complaint was filed May 23, 1974 (Tr. 36)[1], and sought relief under a variety of theories, including the FLSA. An intervening amended complaint was filed in August 1977 abandoning the FLSA claim (Tr. 57). In April 1985 Plaintiffs sought to amend the complaint yet again to attempt to revive the FLSA claim (Tr. 103). Amendment was permitted by the trial court on

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[1] All record cites are to the state court record and are noted as "Tr. ___."

December 2, 1985 (Tr. 154).[2] At no point in this proceeding did Plaintiffs timely file individual consents to proceed as required by the FLSA. *See* 29 U.S.C. § 216 (Opposition Appendix A).

Independently, the Secretary of Labor brought suit seeking to have the 1966 amendments to the FLSA made applicable to Indiana mental hospital employees during this period. While he prevailed in the Seventh Circuit, *Brennan v. Indiana*, 517 F.2d 1179 (7th Cir. 1975), he lost in this Court. *Indiana v. Usery*, 427 U.S. 909 (1976). On remand, the Secretary's case was dismissed with prejudice (Tr. 1815C, 1815D).

This matter came to trial in 1987. While there is a serious dispute between the parties regarding the evidence, the historical basis of the program is unchallenged. Mental patient industrial therapy assignments were routine in Indiana and other states during this period. In fact, the unrefuted testimony established that some twenty-nine (29) states had uncompensated patient work programs during the early 1970's (Tr. 2348-9 and 2368).[3] An additional eight (8) states had only a token

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[2] The complete procedural history is documented in the decision the petition challenges. *Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991) (A2-4). Appendix citations, unless otherwise noted, are to the Petitioners' Appendix and are marked as "A _".

[3] The professional literature of the day supports this widespread use by most states of nonpay programs. *See* Behavior Today, Ziff-Davis Publishing Company, Inc., One Park Avenue, New York, New York 10016, December 16, 1974 (pp. 331-332), December 23, 1974 (pp. 337-339), December 30, 1974 (pp. 345-346), January 6, 1975 (pp. 351-353), and January 20, 1975 (pp. 364-366).

compensation program (Tr. 2349). At least thirty-seven (37) states, therefore, did not provide what Plaintiffs seek here: payment of the federal minimum wage. The impetus behind collecting these statistics at the time was the presumed binding effect of a district court ruling that the FLSA applied to mental patient therapy assignments nationwide. *Souder v. Brennan*, 367 F.Supp. 808 (D.D.C. 1973).

Plaintiffs' evidence consisted of testimony from eleven former mental patients (A31). Plaintiffs tried to use this confused testimony to generalize the experience of over 7400 class members. None, as noted by the Indiana Supreme Court, was ever punished for refusal to work (A31-32). This was confirmed by all state professional staff who testified.

Even the charitable reading given the Plaintiffs' evidence by the Indiana Supreme Court did not establish that patients were given or threatened with electro-shock for refusing assignments (A21, 31-32). In fact, as the Indiana Supreme Court noted, there was "no evidence that any patients were actually punished in those ways for refusing work" (A32, emphasis in original). The Indiana Supreme Court noted only that "[c]onsidering the impaired mental state of the plaintiffs," persistent rumors could have been given credence (A32).

The industrial therapy assignment system during this period was in a state of change. In Indiana, the system originated at least as far back as the 1816 Constitution (A26). Mental patient labor was actually used to build and finance state hospitals in the last century and the beginning of this century (A26-28), a history not unlike that of other states. Changing theory and the advent of deinstitutionalization in the 1950's and 1960's (Tr. 2346-7, 2361-5, 1827-1829 and 1869) brought substantial modifications to the program. Dr. William Murray, Commissioner of the Indiana Department of Mental Health during this period, and Chairman of the Committee of

the Joint Commission for Accreditation of Hospitals that developed the 1981 national consolidated standards for hospitals, indicated that work assignments had a therapeutic effect, a position supported by professional opinion of the day (Tr. 1827). It also provided exercise, relieved psychosis, and provided a sense of accomplishment (Tr. p. 1829, 1974).[4] In fact, state institutions experienced fights and general unrest along with increased medication and lengthy patient stays when the program was terminated (Tr. 2375, 1981).

By the early 1970's, patient labor was insignificant to the operation of the institutions (Tr. 2432); in fact, much of the effort was a make-work exercise because patients were not very productive (Tr. 2155) and there were more patients than assignments (Tr. 2300). The poor quality of patient work was confirmed by hospital staff who generally noted that light, non-dangerous duty was given (Tr. 1509, 1485, 1284) and much supervision was required due to low functioning patients (Thompson Dep. p. 9 and 10[5] and Tr. 2154-5). Consequently, the thrust of the program was work therapy as opposed to maintenance of the facility.

The evidence from all professional staff was clear that no one was punished for failure to participate (Tr. 2027, 2077, 2099, 2109, 2110, 2138, 2257, 2299). Assignments were

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[4] Occasional law review articles described such programs and their benefit in other states. The New Jersey system is a good example. Note, *Hospitalization of Mentally Ill Criminals in Pennsylvania and New Jersey*, 110 U.Pa.L.Rev. 78, 89 (1961).

[5] The deposition quoted here is part of the record but was not paginated. It is part of the supplemental record.

developed to increase the job skills of the generally low functioning patient population left by deinstitutionalization and provide the kinds of experiences necessary to make the patient employable in the job market (Tr. 1976, 1978, 1983, 1984, 2029, 2036, 2132, 2265, 2300, 2304, 2309). Assignments, if appropriate to the patient's condition, were made by a treatment team composed of professionals at the institutions (Tr. 2020, 2058, 2132, 2254-5, 2296, 2297).

After a one year paid phase-out program ended and no assignments were made, a new paid program was instituted in 1977 based on a sliding hourly rate down from the minimum wage and gauged to the productivity of the patients and the sheltered workshop scale of the FLSA (Tr. 1977, 2374). 29 U.S.C. § 214(c) (Opp. App. A).

During trial, the State offered evidence of nearly $240 million in outstanding bills for services rendered to the plaintiff class members which was rejected by the trial court (Tr. 2210-13, 2221, 2228). On direct appeal, the Indiana Supreme Court reversed that holding, thereby admitting this evidence (A37). As noted by the Indiana Supreme Court, this calculation was based on long-standing Indiana statutes which authorize charging mental patients a set fee for their "maintenance, care and treatment," quoting 1971 Ind. Acts Public Law 474, § 4(d) and Ind. Code § 16-14-18.1-3 (A37-38, fn. 27).

The trial court awarded Plaintiffs $27,954,852 in damages (half was obtained by multiplying hours worked or an invented average of hours worked by $1.60; the other half was prejudgment interest) (A65) on six theories. From this amount, Plaintiffs' counsel was awarded $5,500,000 with permission to bill an additional 10,000 hours at $250 per hour for a total

potential fee recovery of $8,000,000 (Tr. 1064 and A70-71).[6] The Indiana Supreme Court did not reach the issue of fees, having decided that no claim was established by Plaintiffs on any of their six separate theories (A38).

On consideration of Plaintiffs' petition for rehearing, the Indiana Supreme Court noted that the Thirteenth Amendment, which had occupied only five pages of Plaintiffs' argument during briefing, had become for the first time the central focus of the litigation (A93).[7] The Indiana Supreme Court affirmed its decision on the Thirteenth Amendment issue, and noted in passing that the thousands of voluntarily admitted patients involved in the case could not logically have been subjected to involuntary servitude (A93).

The Petition is directed solely to the Thirteenth Amendment and FLSA analysis of the Indiana Supreme Court. The Petition waives any claimed error in the other four unsuccessful state law theories. (Pet. p. 5 fn. 7).

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[6] The Plaintiffs' Appendix omits the portion of the final judgment which awarded Plaintiffs' counsel a base fee of $5,500,000.

[7] The focus of this aged case has shifted periodically: originally the focus was the FLSA; after 1977 it became a state statutory claim (A73); and at opening statement in trial it became the Indiana Constitution (A51-52).

REASONS FOR DENIAL OF THE WRIT

I.

AS THE THIRTEENTH AMENDMENT DOES NOT PROHIBIT THE ASSIGNMENT OF MENTAL PATIENTS TO INDUSTRIAL THERAPY, A GRANT OF CERTIORARI WOULD NOT RESOLVE A SUBSTANTIAL FEDERAL QUESTION ON THE FACTS OF THIS CASE.

A.

THIS COURT REAFFIRMED THE SCOPE OF COMMON LAW EXCEPTIONS TO THIRTEENTH AMENDMENT APPLICATION IN *UNITED STATES v. KOZMINSKI*, 487 U.S. 931 (1988), AND THIS CASE MERELY PRESENTS APPLICATION OF THE EXCEPTIONS TO UNIQUE AND NON-RECURRING FACTS.

The core of both Thirteenth Amendment issues framed by Plaintiffs is whether a damage award against a state government is available for an historically-based national practice of using mental patients in uncompensated industrial therapy assignments. For the reasons stated herein, it is not.

As found by the Indiana Supreme Court, the industrial therapy assignments at issue here come well within the recognized exceptions to the Thirteenth Amendment slavery bar established by this Court (A19-20).

The most recent Thirteenth Amendment case from this Court confirms that the amendment does not reach labor performed as part of a civic duty or in "'exceptional' cases well established in the common law at the time of the Thirteenth

Amendment." *United States v. Kozminski*, 487 U.S. 931, 944 (1988). Justice O'Connor, writing for the Court, cited *Robertson v. Baldwin*, 165 U.S. 275 (1897).[8] In *Robertson*, the Court stated:

> It is clear, however, that the [thirteenth] amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview.

Robertson, 165 U.S. at 282.

In *Butler v. Perry*, 240 U.S. 328 (1916), also cited in *Kozminski*, the Court stated:

> [T]he Thirteenth Amendment declares that neither slavery nor involuntary servitude shall exist. This amendment was adopted with reference to conditions

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[8] *Kozminski* also determined, it is worth noting, that "psychological coercion" is insufficient to establish slavery. *Kozminski*, 487 S.Ct. at 952.

> existing since the foundation of our Government, and the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.

240 U.S. at 332-33.

Consistent reaffirmation of a common law test for the Thirteenth Amendment can leave little doubt that industrial therapy for mental patients is excluded. As the Indiana Supreme Court noted (A20 fn. 20), the Indiana constitutional provision which was the centerpiece of the Plaintiffs' case below and the Thirteenth Amendment share a common heritage. In short, what began in 1816 with uncompensated mental patient labor actually constructing and operating mental asylums and farms (A26-28) cannot fairly be stated to lack an historical common law basis.

While a few courts have addressed the issue of mental patients and the Thirteenth Amendment directly, *see, e.g., Kennedy v. Meara*, 127 Ga. 68, 56 S.E. 243 at 247 (1907), and *Ex parte Lloyd*, 13 F.Supp. 1005 (E.D. Ky. 1936); some have noted the practical existence of such programs in relation to the statutory bills patients accrued. *See, e.g., In re Peterson*, 74 P.2d 60 at 62 (Ore. 1937). Plaintiffs' lengthy footnote claim

to wide applicability is unsupportable (Petition, p. 9, fn. 10).[9] It is worth noting that the trend that arose nationally in the late

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[9] Plaintiffs have pulled snippits of dicta from a wide range of cases; some lower court denials of dismissal or summary judgments; some criminal appeals or habeas reviews, among others. Few even concern state mental patients. *Jobson v. Henne*, 355 F.2d 129 at 132 (2nd Cir. 1966)(no consideration of a direct cause of action under the Thirteenth Amendment; damages possible against specific institution officials under 42 U.S.C. § 1983 as a remedial vehicle for assignments "devoid of therapeutic purpose"); *Arahovitis v. State*, 466 N.Y.S. 2d 928 (Ct. Claims 1983)(state court awards a patient barber back wages in a case that makes no mention of the Thirteenth Amendment or any provision of the Constitution); *Buzzelle v. Colorado State Hospital*, 491 P.2d 1369 (Colo. 1971)(patient billing case rejecting the patient's claim for set-off for therapeutic work performed; no consideration of whether a damage action exists at all); *Matter of S.C.*, 790 S.W. 2d 766 (Ct. App. Tex 1990)(held only that juvenile offenders were being punished for "crimes" and were outside the Thirteenth Amendment; no discussion of a damage action under any provision); *Stone v. Paducah*, 86 S.W. 531, 533 (Ct. App. Ky. 1905)(held that local ordinance requiring work could apply to convicts, but not to "idiots, insane persons or inebriates;" no discussion of a damage remedy); *United States v. King*, 840 F.2d 1276 (6th Cir. 1988), *cert. denied* 488 U.S. 894 (1988) (criminal action based on implementing statute; does not mention the Thirteenth Amendment); *Santiago v. Philadelphia*, 435 F.Supp. 136, 157 (E.D. Pa. 1977)(finding a possible damage action for youth center inmates based on 42 U.S.C. § 1994 which was "intended to implement the thirteenth amendment"); *King v. Carey*, 405 F.Supp. 41 (W.D. N.Y. 1975)(the court assumed at the motion to dismiss stage the existence of a damage action

1960's and early 1970's to question the remnants of this system, and, in fact, inspired this lawsuit (A2 fn. 1), was not based on a supposed violation of the Thirteenth Amendment, but instead on concern about the FLSA and Congress' first efforts to extend its coverage to state employment in 1966, discussed later in this Brief.

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footnote 9 (cont.)

under § 1983 for a possible violation of the Thirteenth Amendment); *Bobilin v. Board of Education*, 403 F.Supp. 1095, 1100 (D.Hawaii 1975) (student cafeteria assignments were not involuntary servitude); *Weidenfeller v. Kidulis*, 380 F.Supp. 445, 450 fn. 7 (E.D. Wis. 1974) (on motion to dismiss court assumed a possible damage remedy under §1983 as implementing the Thirteenth Amendment); *Downs v. Dept. of Public Welfare*, 368 F.Supp. 454 (E.D. Pa. 1973)(at motion to dismiss stage, court found that damages against involved state officers existed, but not against state entity under § 1983); *Wyatt v. Stickney*, 344 F.Supp. 373 (M.D. Ala. 1972)(an injunction in a "conditions suit" which did not mention the Thirteenth Amendment or a damage action); *Parks v. Ciccone*, 281 F.Supp. 805 (W.D. Mo. 1968)(federal habeas corpus action which mentions neither the Thirteenth Amendment nor mental patients); *Johnston v. Ciccone*, 260 F.Supp. 553 (W.D. Mo. 1966)(habeas corpus relief was available for Thirteenth Amendment violation; no consideration of a damage action); and *Tyler v. Harris*, 226 F.Supp. 852 (W.D. Mo. 1964) (same as *Johnston)*.

Selected dicta does not establish either a Thirteenth Amendment bar to patient assignment to industrial therapy, or the availability of damages under the amendment. Neither do these cases indicate that there is any raging controversy or "split" among these courts as to the Thirteenth Amendment's applicability to mental patients.

It is also worth noting that patients involved in the assignments during this period, while not compensated in money, were, as noted by the Indiana Supreme Court and the unanimous view of state professionals who testified, provided valuable psychological benefits and employment training (A30). A ruling that the Thirteenth Amendment requires payment for program participation would raise serious constitutional questions nationwide for public (and private) programs such as workfare and "token" economies developed for welfare recipients and the handicapped.[10] Neither the law nor the facts support a finding that the Thirteenth Amendment was violated in this case.

B.

THE PRACTICE OF UNCOMPENSATED THERAPEUTIC PATIENT LABOR, WHILE COMMON AT THE TIME, WAS DISCONTINUED IN 1974.

It is undisputed that at least 29 states had unpaid programs in the early 1970's. While old statutes in Indiana required the use of patient labor to construct and operate hospitals and

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[10] Work in return for a benefit conferred by taxpayers to indigents is on firm historical ground. *See City of Taunton v. Talbot*, 186 Mass. 341, 71 N.E. 785 (1904); *Marshall County v. Lippincott*, 137 Iowa 102, 111 N.W. 801 (1907); *McBurnay v. Industrial Accident Commission of California*, 220 Cal. 124, 30 P.2d 414 (1934); *Vaivida v. City of Grand Rapids*, 264 Mich. 204, 249 N.W. 826 (1933); *Commonwealth v. Pouliet*, 292 Mass. 229, 198 N.E. 256 (1935); *Dubline v. New York State Department of Social Services*, 348 F.Supp. 290 (W.D. N.Y. 1972); *Brogan v. San Mateo County*, 901 F.2d 762 (9th Cir. 1990).

farms in the early years (A26-27), the program which Plaintiffs wish to challenge ceased to exist in December 1974. With the advent of the sheltered workshop program of the FLSA, 29 U.S.C. § 214(c)(Opposition Appendix A) and its adoption in Indiana in 1977, resolution of this case would be an academic exercise on historical facts with no wider legal significance.

II.

THIS IS AN INAPPROPRIATE CASE IN WHICH TO DECIDE WHETHER THE THIRTEENTH AMENDMENT PROVIDES A DIRECT REMEDY FOR DAMAGES.

A.

THE PLAINTIFFS CONCEDED AT TRIAL THAT THEY LACKED A DIRECT REMEDY.

At trial Plaintiffs conceded that the remedial vehicle for their Thirteenth Amendment claim was 42 U.S.C. § 1983 (A18, Tr. 2514). Their concession was correct, for in the *Civil Rights Cases*, 109 U.S. 3 (1883), this Court noted that while the Amendment abolished slavery, a remedial vehicle was necessary to provide relief:

> This Amendment, as well as the 14th, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect, it abolished slavery and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the Amendment

is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law; and, therefore, the 13th Amendment may be regarded as nullifying all state laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom through the United States; and it is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States; and upon this assumption it is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances and places of public amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the Amendment. Conceding the major propositions to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents is the minor proposition also true, that the denial to any person of admission to accommodations and privileges of an inn, a public conveyance or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery?

(emphasis added)

109 U.S. at 20.

Similarly, the *Slaughter-House Cases*, 83 U.S. 36, 69, 71-72 (1873) held that peonage was abolished with no indication that a damage remedy, if any, was available. An impressive number of lower courts have determined, or strongly suggested, that no direct cause of action is created by the Thirteenth Amendment.[11]

This Court's recent cases do not change this result. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), this Court simply extended longstanding Fourteenth Amendment and Fifth Amendment law to a total but temporary taking of real property by a municipality through regulation. The Court traced the sources of this direct cause of action back to 1933, 482 U.S., at 315, *citing Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26 (1933),

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[11] *Clark v. Universal Builders, Inc.*, 409 F.Supp. 1274, 1279 (N.D. Ill. 1976) (dismissing claim based directly on thirteenth amendment in action against seller of homes who had allegedly discriminated against black purchasers); *Sanders v. A.J. Canfield Co.*, 635 F.Supp. 85, 87 (N.D. Ill. 1986) (dismissing plaintiff's employment discrimination claim based directly on the Thirteenth Amendment); *Westray v. Porthole, Inc.*, 586 F.Supp. 834, 838-39 (D. Md. 1984) (dismissing claim based directly on Thirteenth Amendment in suit against a nightclub for refuse to admit black patrons); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F.Supp. 993, 1012 (S.D. Tex. 1981) (suggesting the Thirteenth Amendment does not create direct case of action); *Lopez v. Sears, Roebuck & Co.*, 493 F.Supp. 801, 806-07 (D. Md. 1980) (dismissing employment discrimination claim based directly on Thirteenth Amendment); *Roberts v. Walmart*, 736 F.Supp. 1527 (E.D. Mo. 1990) (no private cause of action created by the Thirteenth Amendment).

and noted that the Fifth Amendment was made applicable to the states through the Fourteenth Amendment in 1897, *First English*, 482 U.S. at 310 fn. 4, *citing Chicago B & O R. Co. v. Chicago*, 166 U.S. 226 (1897). A long and continuous history of requiring damages for land condemnation, both direct and inverse, based upon a constitutional provision explicitly requiring "just compensation", does not support a novel creation of such a claim for the Thirteenth Amendment or, more importantly, its application for the first time here.[12]

The same can clearly be said of Plaintiffs' flawed analogy to *McKesson v. Division of Alcoholic Beverages and Tobacco*, 495 U.S. ___, 110 S.Ct. 2238 (1990). In *McKesson*, this Court found that a lengthy history of tax cases indicated that the Eleventh Amendment did not bar some form of a refund mechanism required by the Due Process Clause of the Fourteenth Amendment for taxpayers who were given no opportunity to challenge payment of a tax imposed in violation of the Commerce Clause. A careful reading of the decision shows very clearly that the key to the outcome was the Florida court's failure to permit any refund or any form of relief to complaining taxpayers challenging the constitutionality of a tax mechanism essentially identical to the scheme invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In fact, the reality that *Bacchus* controlled the issue made the Florida court's generalized ruling that "equitable considerations" prohibited

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[12] While a property owner receives nothing if he is not paid for either a permanent or a temporary taking, the Indiana Supreme Court noted that Plaintiffs received value from the work experience (A30). In fact, progressing from low skilled positions to high skilled positions enabled chronic patients to obtain real employment in the community (A30). The program denied the patients nothing; it provided value.

retrospective application due to "good faith reliance on a presumptively valid statute" transparently thin. *McKesson*, 110 S.Ct. at 2254-5. The fact that Florida stayed application of its ruling of unconstitutionality on appeal, thereby permitting collection of a tax this Court determined to be in violation of the Commerce Clause years earlier, 110 S.Ct. at 2244 fn. 5, came very close to being a direct challenge to this Court's power to make its constitutional precedents binding.[13]

Neither case even hints at establishment of a direct damage action under the Thirteenth Amendment.

B.

ANY DAMAGE CLAIM RECOVERABLE BY THE PLAINTIFFS WOULD BE MOOTED BY THE STATE'S CLAIM OF $240 MILLION FOR CARE AND TREATMENT, MAKING THIS NOTHING MORE THAN A DISPUTE OVER ATTORNEY FEES.

Indiana has provided that mental patients with financial resources are to pay a fixed cost of their care and treatment. Ind. Code 16-14-18.1-3 (Opposition Appendix B). A version of this statute has been in effect since at least 1917. Acts of 1917, Chapter 72.

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[13] It is worth noting that despite Florida's challenge to this Court's decisions, the result was not a command to provide a refund, but a direction to provide some form of relief to those who timely challenged the tax, *Id.* at 2258, and suggestions as to how to avoid due process concerns in the future, *Id.* at 2257.

With admission of evidence showing outstanding claims against Plaintiffs of nearly $240 million for services, granting of certiorari and finding a private cause of action for damages will provide these Plaintiffs with nothing but a Pyrrhic victory. In addition to a few who might recover something, the only real party in interest is counsel who will seek to obtain a portion of the damage recovery as attorneys' fees before it disappears.

The question of whether counsel can obtain attorneys' fees from tax revenue as it moves from one state pocket to another by set-off or escheat clearly lacks a cognizable practical reason or a timely intellectual foundation to grant certiorari on the underlying substantive legal issue.[14] Plaintiffs have not sought certiorari on any attorney fees issue, but a result favorable to them on their Thirteenth Amendment claim will, as a practical matter, reduce this case to an attorneys' fee dispute.

C.

IF A DIRECT DAMAGE REMEDY WERE FOUND, THE COURT WOULD NOT APPLY IT RETROSPECTIVELY TO THIS CASE.

The companion case decided the same day as *McKesson, American Trucking Associations, Inc. v. Smith*, 495 U.S. ___, 110 S.Ct. 2323 (1990), shows very clearly why acceptance of

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[14] In addition, a large number of the Plaintiffs are deceased or have disappeared. Those still living who receive any recovery which boosts their assets over $1500 ($2250 if married) would become Medicaid ineligible and either be discharged from their private placements until a "spend-down" occurs, or would have the recovery applied to the bill until eligibility was regained. 470 IAC 9.1-3-17 or 405 IAC 2-3-15.

Plaintiffs' invitation to create an original damage action against a state government will be of no avail to them. In *Smith*, this Court reaffirmed the test for nonretrospective application of case holdings announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and concluded that an earlier decision holding that flat highway use taxes were unconstitutional, *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987), met the three elements of the test for prospective application only and applied from the date of the earlier decision. [15]

In short, a decision creating a damage action against state government directly under the Thirteenth Amendment for allegedly "enslaving" some mental patients through industrial therapy assignments between 1970 and 1974 (1) would unquestionably be a new principle of law; (2) applying it retrospectively would not meaningfully further future adherence to freedom; and (3) applying such a principle retrospectively would be inequitable and produce a tremendous impact on the state treasury. This case would meet the *Chevron* factors - just as the Commerce Clause action did in *Smith* - and reduce the value of any decision by this Court to an academic exercise on an issue of no general significance.

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[15] This Court's decision in *James B. Beam Distilling Co. v. Georgia*, U.S., 111 S.Ct. 2439 (1991), does not change the result. The admittedly narrow holding of *James Beam* says simply that once this Court applies a decision to one set of litigants, it must apply them to all. 111 S.Ct. at 2448. As this Court has never found a private cause of action for damages against a state for allegedly enslaving its citizenry, there is no binding precedent to apply here. Also *Beam* notes that this Court has used *Chevron* to deny application of the decision to the litigants who establish the new principle. *Beam* at 2443-4.

III.

THE PLAINTIFFS' FLSA CLAIM IS PROCEDURALLY DEFECTIVE, MAKING IT AN INAPPROPRIATE VEHICLE FOR A SUBSTANTIVE RULING ON THE FLSA.

Plaintiffs rush to challenge the Indiana Supreme Court's application of retrospective/prospective rules naturally arising in this Court's reversals on FLSA application to core governmental state employment. *See National League of Cities v. Usery*, 426 U.S. 833 (1976), and *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Plaintiffs cannot reach that question on the record in this case; their unexplained failure to abide by procedural requirements of the FLSA violates the very statute they seek to invoke, and prohibits consideration of any FLSA issue. The Indiana Supreme Court considered these issues as "Other Problems with the Claim" (A14-15).

The first problem, and the one which completely disposes of the FLSA claim, is that there are no plaintiffs in the case to mount the challenge. The FLSA specifically requires that each plaintiff desiring to file an FLSA damage action, or be a part of any pending action, file a written consent with the court. 29 U.S.C. § 216(b). In a remarkably consistent pattern, every court to consider this issue has determined that the statute means precisely what it says: each litigant must file a written consent.[16]

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[16] *See LaChappelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975); *Woods v. New York Life Insurance Company*, 686 F.2d 578 (7th Cir. 1982); *Schmidt v. Fuller Brush Company*, 527 F.2d 532 (8th Cir. 1975); and *Partlow v. Jewish Orphans' Home of Southern California*, 645 F.2d 757 (9th Cir. 1981).

Plaintiffs, who first raised an FLSA claim in the original 1974 complaint (R. 36), filed no consents. They filed none prior to their abandonment of the FLSA in 1977. Plaintiffs' revived FLSA claim in 1985 similarly was unaccompanied by any consents.

Plaintiffs have not to this day filed timely personal written consents to bring an FLSA action, and are, therefore, barred from litigating here or anywhere an FLSA claim regarding employment between 1970 and 1975 for any plaintiff. The Indiana Supreme Court was incorrect in claiming that the named plaintiffs had filed timely consents; not one has filed.[17] A single individual consent filed in October, 1986, (Tr. 408) preserves no claim regarding employment between 1970 and December of 1974. As noted by the Indiana Supreme Court, 29 U.S.C. § 256(b)(Opposition Appendix A) indicates that an FLSA claim is deemed to commence for an individual when that individual's consent is filed. As the FLSA permits only either a two or three year statute of limitation, 29 U.S.C. § 255 (A15), there can be no plaintiffs.[18] (Opposition Appendix A).

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[17] Plaintiffs curiously refer to the Indiana Supreme Court's decision acknowledging universal interpretation of federal statutory law regarding FLSA consent as "dicta" (Petition, p. 26 fn. 30). It is not; it is, in fact, dispositive of Plaintiffs' entire FLSA claim.

[18] This conclusion is also universally reached by all courts to consider the issue. *Atkins v. General Motors Corp.*, 701 F.2d 1124 (5th Cir. 1983); *O'Connell v. Champion Intern Corp.*, 812 F.2d 393 (8th Cir. 1987); *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 259 (9th Cir. 1977).

In short, no individual claimant attempting to file a consent in October 1986 can raise an FLSA claim last occurring December 31, 1974.

There are a number of other flaws which prohibit Plaintiffs from raising an FLSA claim. Two were noted by the Indiana Supreme Court (A14-5). First, Congress meant the 1966 FLSA amendments to apply only to regular employees of state hospitals and, second, 29 U.S.C. § 259 immunized an employer from damages for reliance on Department of Labor guidelines. *See* DOL Release G-874, Appendix B to the decision in *Souder v. Brennan*, 367 F.Supp. 808 at 816 (D.D.C. 1973).[19]

In addition, in 1971 the Secretary of Labor, pursuant to 29 U.S.C. § 216(c), sought payment of FLSA wages to employees of Indiana state mental hospitals. While the Secretary won in the Seventh Circuit, *Brennan v. State of Indiana*, 517 F.2d 1179 (7th Cir. 1975), he lost here. *Indiana v. Usery*, 427 U.S. 909 (1976).[20] The actions were dismissed with prejudice (Tr. 1815C, 1815D). If Plaintiffs claim (as they must) that mental

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[19] Indiana would also note that if *Souder* is treated as a nationwide binding class action, then the one year grace period for patient labor coverage is also binding. In fact, the beginning of the paid phase-out program instituted in Indiana precisely matches the end of the presumed grace period set in *Souder*. Indiana sought to comply with the law, not violate it. *Souder*, 367 F.Supp. at 810.

[20] This case declared the 1966 FLSA amendments to be unconstitutional. The period covered in the case at bar is May 23, 1970 to December 31, 1974. The 1974 FLSA amendments voided by *National League* and "revived" by *Garcia* applied only from May 1, 1974 forward.

patients are "employees" under the FLSA, then they are estopped by the failed efforts of the Indiana hospital employees in *Indiana v. Usery*.

If not, as noted by the Indiana Supreme Court (A13), the bizarre result would be that patients were covered by the FLSA during the period while the regular staff was not.

IV.

THE APPLICABILITY OF THE CONTRAVENING DECISIONS IN *NATIONAL LEAGUE* AND *GARCIA* TO A CASE ARISING BETWEEN 1970 AND 1974 IS NOT AN IMPORTANT FEDERAL QUESTION.

This Court applied the 1966 FLSA amendments to state hospital employees in *Maryland v. Wirtz*, 392 U.S. 183 (1968), reversed its position in 1976 and denied application of the 1974 FLSA amendments in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and reversed itself again to uphold the 1974 FLSA amendments in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Indiana Supreme Court, using the test established in *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), and noting that the normal rule applies case law retrospectively, denied retrospective application of *Garcia* and applied *National League* retrospectively (A11-14).[21] Plaintiffs suggest that applying the rule of *National League* to labor now covered by the FLSA

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[21] The Indiana Supreme Court found the following facts to meet the three part *Chevron* test for prospective application of *Garcia*: (1) Indiana did not engage in the useless act of obtaining a declaratory judgment finding the FLSA inapplicable after *National League* (a case in which Indiana was a named party), relying on *National League* as foreclosing liability in

pursuant to *Garcia* is inappropriate. Actually, to apply any other result to the shifting sands underlying FLSA application to state employment is inappropriate and highly prejudicial to state employers and public taxpayers.

Perhaps the most compelling evidence supporting this result is that this Court itself applied *National League* retrospectively to the State of Indiana concerning the 1966 FLSA amendments at issue in this case. *See Indiana v. Usery*, 427 U.S. 909 (1976). This, coupled with no case applying *Garcia* retrospectively to traditional state functions supports the correctness of the result reached below.[22] Prospective application

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footnote 21 (cont.)

this or any case; (2) financial havoc would result to the state budget and do little to insure future compliance, noting that even Mr. Garcia was not awarded wages despite establishing his right to them, *Garcia v. San Antonio Metropolitan Transit Authority*, 838 F.2d 1411, 1418-20 (5th Cir. 1988), *cert. denied* 488 U.S. 889 (1988); and (3) awarding patients FLSA coverage for a period when Indiana hospital staff (nor anyone else for that matter) obtained coverage would be inequitable (A11-14).

[22] *See Achinclose v. Palm Beach Florida*, 854 F.2d 931 (11th Cir. 1988); *Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939 (3rd Cir. 1985); *Kartevold v. Spokane County Fire Protection*, 625 F.Supp. 1553 (E.D.Wash. 1986); *Kukla v. Village of Antioch*, 647 F.Supp. 799; *Thurman v. City of Union City, Tennessee*, 628 F.Supp. 146 (W.D.Tenn. 1986); and *Brooks v. Village of Lincolnwood*, 620 F.Supp. 24 (N.D.Ill. 1985). Three district courts permitted pre-*Garcia* claims against municipalities only after determining that the job met

of *Garcia* is, in reality, the only result fiscally possible given the financial chaos that was a real possibility following this Court's sudden abandonment of *National League*.

This Court has not directly decided the issue of retrospective/prospective application of *Garcia*, but did deny certiorari to Mr. Garcia, *Garcia v. San Antonio Transit Authority*, 838 F.2d 1411 (5th Cir. 1988), *cert. denied*, 488 U.S. 889 (1988), when he raised precisely that question. While Indiana, as well as other states, might welcome the return visit to the FLSA suggested by the *Garcia* minority, *Garcia*, 469 U.S. at 580 and 589, it should occur in a case unencumbered by the fatal procedural flaws that burden this FLSA action.

A resolution of this case on less than reversal of *Garcia* would have no meaningful application to FLSA litigation. It is most unlikely that there exists anywhere in this country a live case regarding public employment or wages from 1970 through 1974 which will benefit from a lengthy decision from this Court on when *Wirtz*, *National League*, *Usery*, and *Garcia* applied or did not apply. Nor will a scholarly discussion of retrospective/prospective application of case law provide general guidance, as FLSA application to public employment appears uniquely volatile.

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footnote 22 (cont.)

the *National League* test; *i.e.* non-traditional employment. *Bester v. Chicago Transit Authority*, 676 F.Supp. 833 (N.D.Ill. 1987); *Brusstar v. Southeastern Pennsylvania Transportation Authority*, 636 F.Supp. 1557 (E.D.Penn. 1986); and *Joynerr v. City of Macon*, 627 F.Supp. 1352 (N.D.Ga. 1986).

In short, the FLSA issue Plaintiffs raise on certiorari does not matter even to them and has no wider significance. As Plaintiffs have failed to comply with the very act they seek to invoke, *i.e.*, have filed no timely "opt-in" notices, along with the other subsidiary problems noted herein, and are wrong on the prospective/retrospective issue in any event, they have failed to present an issue to justify discretionary review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

FAIR LABOR STANDARDS ACT
TITLE 29, U.S. CODE

§ 214 Employment under Special Certificates

* * *

(c) Handicapped workers

(1) The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals (including individuals employed in agriculture) whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are—

(A) lower than minimum wage applicable under section 206 of this title,

(B) commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work, and

(C) related to the individual's productivity.

(2) The Secretary shall not issue a certificate under paragraph (1) unless the employer provides written assurances to the Secretary that—

(A) in the case of individuals paid on an hourly rate basis, wages paid in accordance with paragraph (1) will be reviewed by the employer at periodic intervals at least once every six months, and

(B) wages paid in accordance with paragraph (1) will be adjusted by the employer at periodic intervals, at least once each year, to reflect changes in the prevailing wage paid to experienced nonhandicapped individuals employed in the locality for essentially the same type of work.

(3) Notwithstanding paragraph (1), no employer shall be permitted to reduce the hourly wage rate prescribed by certificate under this subsection in effect on June 1, 1986, of any handicapped individual for a period of two years from such date without prior authorization of the Secretary.

(4) Nothing in this subsection shall be construed to prohibit an employer from maintaining or establishing work activities centers to provide therapeutic activities for handicapped clients.

* * *

§ 216 Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims, actions by Secretary of Labor; limitation of actions; savings provision

* * *

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of

their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for an in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefore under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

* * *

§ 255 Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 *et seq.*], the Walsh-Healey Act [41 U.S.C.A. § 35 *et seq.*], or the Bacon-Davis Act [40 U.S.C.A. § 276a *et seq.*] -

(a) if the cause of action accrues on or after May 14, 1947 - may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

* * *

§ 256 Determination of commencement of future actions

In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 *et seq.*], the Walsh-Healey Act [41 U.S.C.A. § 35 *et seq.*], or the Bacon-Davis Act [40 U.S.C.A. § 276a *et seq.*], shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the

Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant -

(a) on the date when the complaint if filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear - on the subsequent date on which such written consent is filed in the court in which the action was commenced.

APPENDIX B

Ind. Code 16-14-18.1-3. Liability for cost of treatment and maintenance - Exception for certain handicapped children - Day or night care services - Outpatient services - Statement of charges - Lien - Priority. - (a) Each patient in a psychiatric hospital and the responsible parties, individually or collectively, are liable for the payment of the cost of treatment and maintenance of the patient. However, whenever placement of a handicapped child (as defined by IC 20-1-6-1) in a state owned or operated psychiatric hospital is necessary for the provision of special education psychiatric hospital is necessary for the provision of a special education for that child, the cost of the child's education program, nonmedical care, and room and board shall be paid by the department of mental health rather than by the child's parents, guardian, or other responsible party. The child's parents, guardian, or other responsible party shall pay the cost of any transportation not required by the child's individualized education program (as defined by IC 20-1-6-1). The school corporation in which the child has legal settlement shall pay the cost of transportation required by the student's individualized education program under IC 20-1-6-18.2. However, this section does not relieve an insurer or other third party from an otherwise valid obligation to provide or pay for the services provided to the child. The state board of education and the department of mental health shall jointly establish a procedure and standards for determining when hospital placement is necessary for the provision of special education for a child.

(b) . . .

(c) In accordance with this chapter, the commissioner of the department of mental health shall compute the cost of treatment and maintenance for each patient in a psychiatric hospital.

(d) If any patient in a psychiatric hospital has insurance coverage which covers hospitalization or medical services in psychiatric hospitals, all benefits thereunder, in an amount not to exceed the cost of treatment and maintenance of such patient, shall be assigned to the department of mental health.

(e) A charge shall be assessed for day or night care services provided by a psychiatric hospital in an amount not to exceed one-half (1/2) of the per capita cost for care at that psychiatric hospital as computed under this chapter. For the purposes of the fiscal year computation of the per capita cost of care and maintenance, a day or night care patient is to be considered and counted as a one-half (1/2) day patient.

(f) Outpatient services provided by a psychiatric hospital shall be based upon the average per capita cost of each service or program at the providing psychiatric hospital.

(g) The department of mental health shall issue to any party liable under this chapter for any type of psychiatric service statements of sums due as maintenance charges, requiring them to pay monthly, quarterly, or otherwise as may be arranged, an amount not exceeding the maximum cost as determined under this chapter.

(h) The estate of any patient who receives care, treatment, maintenance, or any other service furnished by the department at the state's expense shall be liable for payment of the cost of the service and shall be exempt from the provisions of subsection (g) or any part of this chapter directly in conflict with the intent of the chapter to hold a patient's estate liable for payment.

(i) The liability created by this chapter for payment of any type of cost of treatment and maintenance of a patient shall constitute a lien upon the real property of the patient and responsible parties of the patient whenever the lien has been recorded according to the provisions of this chapter. Such lien shall have priority over all liens subsequently acquired.